1964

J. Seal v. Tayco, Inc. : Brief of Appellant

Utah Supreme Court

Hanson & Garrett; Attorneys for Respondent;
Hansen & Sumsion; Attorneys for Appellant

IN THE SUPREME COURT
of the
STATE OF UTAH

J. SEAL,
Plaintiff and Appellant,

—vs.—

TAYCO, INC.,
Defendant and Respondent.

Case No. 10171

BRIEF OF APPELLANT

Appeal from Judgment of Third District Court for
Salt Lake County
Hon. Ray Van Cott, Jr., *Judge*

HANSON & GARRETT
Attorneys for Respondent
520 Continental Bank Building
Salt Lake City 11, Utah

HANSEN & SUMSION
Attorneys for Appellant
65 East 4th South
Salt Lake City 11, Utah

TABLE OF CONTENTS (Continued)

TABLE OF CONTENTS

CASES CITED

TEXTS CITED

IN THE SUPREME COURT
of the
STATE OF UTAH

J. SEAL,
Plaintiff and Appellant,
—vs.—
TAYCO, INC.,
Defendant and Respondent.

Case No. 10171

STATEMENT OF FACTS

This is a suit on an open account. The lower court entered judgment for the plaintiff-appellant for a reduced amount because of an offset alllowed defendant respondent on a jury verdict. Appellant seeks to have the judgment altered to eliminate the offset amount.

Plaintiff's assignor, the American Brake Shoe Company, sold certain merchandise to the defendant during 1961 as per the statement attached as Exhibit "A" to plaintiff's complaint (R. 2). Defendant's liability to plaintiff for this amount as prayed was not in dispute and it was stipulated at pretrial that plaintiff should have judgment therefor except to the extent that defendant

was entitled to offsets claimed through its predecessor in interest, J. Verne Taylor, which would reduce or cancel out entirely plaintiff's claim depending on the total amount of any offsets (R. 5, paragraph No. 1).

At pretrial defendant asserted two offsets (R. 5, 6, paragraphs No. 2 and No. 3). At trial the first was abandoned (R. 55) and the case went to trial on the second only, which was an alleged loss of profits suffered by defendant's predecessor in interest from an alleged breach of contract in failing to deliver certain track shoes for heavy construction equipment which defendant's predecessor ordered from plaintiff's assignor in January, 1957.

On January 25, 1957, the American Brake Shoes in response to Mr. Taylor's request submitted to him a quotation of prices which provided, inter alia:

"FOR HD-20 AC TRACTOR

240 pcs.	AMSCO Manganese Steel Track Shoe 24" Wide, with straight, high, grouser *266466, Dwg. CB-30204 Wt. 62½# each.	$34.65/100# for resale less 20%
240 pcs.	AMSCO Manganese Steel Track Shoe 26" Wide, with straight, high, grouser *308297, Dwg. CB-30594 Wt. 70# each.	$34.65/100# for resale less 20%
	We do not own any patterns for the HD-20 A.C. Tractor in the non-skid (corrugated or wave) type, but could make them if this	

type is required but then the price would be $44.00/100# less 20% for resale." (EXHIBIT 2)

It also had the date "April 15" typed in on the blank provided in the following printed statement:

"SHIPMENT ..... after receipt of formal order or necessary pattern equipment. Please include complete shipping instructions with your order, whenever possible."

It expressly stated that it was subject to Conditions of Sale specified on the reverse side, which provided inter alia:

"1. CONDITIONS

(a) No terms and conditions contained in any order placed with seller, other than those herein and no agreement or other understanding in any way modifying the terms and conditions herein shall be binding on seller unless hereafter made in writing and signed by its authorized representative.

* * *

"4. DELIVERY

(a) Dates quoted herein are approximate and are based upon prompt receipt of all necessary information.

(b) All sales are f.o.b. seller's plant, Chicago Heights, Illinois, unless otherwise specified. Claims for loss or damage in transit must be filed by buyer. Seller will, however, assist whenever possible, in all such claims.

(c) Seller shall not be liable for any delays or defaults, hereunder by reason of fire, floods, acts of God, labor troubles, inability to secure raw materials, acts of government or other causes beyond its reasonable control. In the event of any such delay, the date of delivery shall be extended for a period equal to the time lost by reason of the delay. In no event shall seller be liable for special or consequential damages.

* * *

"6. CANCELLATIONS

Cancellations of orders may be made only by mutual consent."

On January 30, 1957, a contractor in Idaho placed an order with Mr. Taylor for equipment of the type quoted by American Brake Shoe Company (EXHIBIT 1). On January 31, 1957, Mr. Taylor sent his purchase order No. 7144 to the American Manganese Steel Division, a branch of the American Brake Shoe Company, for the purchase of 240 non skid off-set manganese shoes for HD-20 Allis-Chalmers Tractors (EXHIBIT 3). On February 6, 1957, seller sent buyer the following letter which was a printed form except for the word in italics which were typewritten:

"Gentlemen:

Thank you kindly for your purchase order No. 7144 which, in order to expedite delivery of the castings, has been split up for production at the following plants:

Item No. Article Castings being produced at

The above order has been transferred to our Oakland plant for production.

"Within the course of the next few days, you will receive formal acknowledgment from each of the foundries mentioned above, and at the same time, will receive information concerning shipment of the material.

Yours very truly,

AMERICAN MANGANESE
STEEL DIVISION
By W. E. Broscombe, Jr."

(EXHIBIT 7)

On February 22, 1957, the Oakland Foundry of seller advised the buyer its order was "now being filled in accordance with our standard Condition of Sale or Contract with you. Our Foundry order F57-165 has been assigned to it. Shipment is scheduled ½ April, 1957, ½ May, 1957." (EXHIBIT 8). On March 2, 1957, buyer wrote letter to seller's Oakland, California, foundry which stated, inter alia:

"It is necessary to determine two items in this letter. First, the card received from Mr. Spangenberg on Feb. 22 about the above order. This order was accepted by us for delivery not later than the 2nd week in April 1957 based on authority of Mr. Dantiko and this delivery was by our customer specified as being very necessary. Hence, your card which specified ½ of the order would shipped in April and ½ in May absolutely dismayed us.

"Will you please advance your schedule to meet the promised quotation given us by Mr. Dantiko by air mail 1/23/57, quotation No. 125-I-187, this was specified as sure of delivery by April 15, 1957. Order placed on this basis.

* * *

"Thank you for your fine cooperation in the past, and trusting that compliance with these letter requests will be graciously made." (EXHIBIT 5)

On April 10, 1957, the Idaho contractor referred to above wired a cancellation or his order to Mr. Taylor (EXHIBIT 4) and Mr. Taylor immediately cancelled his order with the American Brake Shoe Company (R. 58). On May 4, 1957, Mr. Taylor wrote to seller's Oakland Foundry as follows:

"American Manganese Steel Div.
850 Ferry Street
Oakland, California

Mr. Ed. Welsh, Western Sales Mgr.

Dear Ed:

"This letter is to acquaint you with the situation at Palisades. We contacted the boys there and they say they are not in a position to take the 26" shoes which they ordered and then cancelled, their #56-2150, our order #7144.

"Because of our warehousing situation, we would not like to take any shoes to warehouse at the present, but when we are able to move some of the three sets we still have, the picture may change appreciably.

"Please therefore, in accordance with our previous telephone conversation cancel our order #7144 for Palisades Contractors.

"We shall go to work on sale of those shoes and some additional ones to make your work to the present profitable, both for ourselves and for you folks. You might, by return mail, advise how much of a change in the 26" pattern would be required to make 24" shoes, for I had a very interesting conversation about 24" shoes the other day.

"How soon might we expect the return of the 20" and 22" shoes which you are preparing for us and advise if you have either of these patterns in your stock for we could use 8 more of the 20" shoes this pattern to complete our set. If you do not have this pattern I will order same from Chicago Heights as soon as you advise me. THIS IS NOT AN ORDER FOR 8."

Very truly yours,
TAYLOR M. & S COMPANY
J. Verne Taylor, Manager"

(EXHIBIT 9)

Thereafter the buyer "considered I had cancelled it and I didn't do any more about it." (R. 59). During the period following April 10, 1957, the American Brake Shoe Company had a local resident agent, Mr. Charles Bauman, who lived in Salt Lake City until March of 1959, who saw Mr. Taylor at least once per month (R. 64, R. 67).

Plaintiff moved for a directed verdict at the close of the trial of this cause on four grounds (R. 40). This

motion was denied and the jury returned a verdict allowing defendant an offset of $2,590.00 (R. 27) which then resulted in a net verdict of $994.42 and judgment was entered on this net verdict plus interest thereon since December 14, 1961 (R. 28). Plaintiff moved for a judgment notwithstanding the verdict and if denied to correct a miscalculation of the offset amount and the Court denied both motions (R. 77). Plaintiff appeals from the judgment entered because of errors in these rulings of the trial court.

ARGUMENT

POINT I

THE CONTRACT OF SALE PROVIDED THAT UNDER NO CIRCUMSTANCES SHOULD THE SELLER BE LIABLE FOR SPECIAL OR CONSEQUENTIAL DAMAGES AND THE DAMAGES ASSERTED BY BUYER IN THIS CASE WERE SPECIAL AND NOT GENERAL DAMAGES SO THE COURT ERRED IN ALLOWING THE JURY TO ASSESS SPECIAL DAMAGES AS AN OFFSET.

As to the exculpatory provision of Paragraph 4(c) of the Conditions of Sale of Exhibit 2, the Trial Court held, after first instructing the jury to the contrary, that the elimination of liability for special damages would be restricted to those particular circumstances that would absolve seller from responsibility for any damages (R. 74). It is appellant's contention, however, that the first

sentence of that paragraph refers to both special and general damages so no liability of any sort could be asserted by the buyer if any of those conditions existed (appellant never contended that they were applicable in this case), whereas the seller would be liable for general but not for special damages if none of such conditions were involved. Any other construction would give no meaning whatsoever to the last sentence and would therefore violate the rule of construction that all terms of a contract will be harmonized to give meaning to all of them if this can be done without violence to the intention of the parties. *Restatement of Contracts,* Sec. 236 (a). It would be more certain if the provisions regarding special damages and general damages were in separate paragraphs but to make that consideration controlling would be to exalt form over substance and give undue weight to a minor difference in form, especially when the words in question were words of art and should be given their technical meaning. *Restatement of Contracts,* Sec. 235 (b).

In the case of *Eastern Brass & Copper Company, Inc. v. General Electric Supply Corporation,* 101 F. Supp. 410, the District Court for the Southern District of New York had a very similar question presented under an exculpatory provision nearly identical to the one at bar. In that case the exculpatory provisions were:

> "We shall not be liable for delays resulting from causes beyond our reasonable control or

> caused by fire, labor difficulties, or delays in our usual sources of supply."

And then further:

> "We shall not, under any circumstances, be liable for special or consequential damages on account of delay."

In that case the court held that the words "special or consequential damages" as used in provisions of a contract for sale of electrical equipment that seller should not under any circumstances be liable for "special or consequential" damages on account of delay were used in contradiction to "general or direct" damages. There the court denied the seller's motion for a summary judgment because some elements of plaintiff's complaint alleged damages which were general rather than special and held that general but not special damages could be recovered despite the provision quoted above. That case was also very similar in that the contract there, as here, eliminated any claim for damages under certain specified conditions of the type which were excluded in this seller's contract. It is to be noted that the court there was not concerned as to the cause of the delay since no mention was made as to the reasons for the delay, hence it read the latter provisions excluding special liability without reference to the earlier provision which excluded liability of any type. It is respectfully submitted that the trial court in this case sought to apply the rule of *ejusdem generis* to a situation where it is not applicable since the seller's liability for special damages is to be determined from the

last sentence of paragraph 4(c) of Exhibit 2 and not from the first sentence of that paragraph.

To the same effect is the holding in the case of *ARMCO Steel Corporation v. Ford Construction Company, Ark.* 372 SW2 630, which held that a contract which provided that in no event should seller be liable for consequential damages did not include direct or foreseeable damages and that damages for breach of an implied warranty of quality were direct and not consequential.

In this case the buyer made no claim for general damages and its offset was clearly based on special damages only as appears in the Jury Instructions No. 3 (R. 70, 71). To allow the jury to grant an offset based on special damages is to contravene the terms of the contract in question and to rewrite the contract for the parties which constitutes error.

POINT II

THE CONTRACT OF SALE BETWEEN AMERICAN BRAKE SHOE COMPANY AND J. VERNE TAYLOR PROVIDED THAT THE TRACK SHOES IN QUESTION SHOULD BE DELIVERED ONE-HALF IN APRIL, 1957, AND ONE-HALF IN MAY, 1957, SO THERE WAS NO BREACH OF CONTRACT WHEN THE BUYER CANCELLED HIS ORDER ON APRIL 10, 1957, AND IT WAS THEREFORE ERROR TO DENY PLAINTIFF'S MOTION FOR A DIRECTED VERDICT.

The buyer's order of January 31, 1957 (EXHIBIT

3) could not have constituted an acceptance of an offer to sell by seller since the latter expressly made orders based on its price quotation subject to home office acceptance (EXHIBIT 2). Such a quotation as EXHIBIT 2 is not an offer under the rule of Sec. 25 of the *Restatement of Contracts,* which provides:

> "WHEN A MANIFESTATION OF INTENTION IS NOT AN OFFER
>
> If from a promise, or manifestation of intention, or from the circumstances existing at the time, the person to whom the promise or manifestation is addressed knows or has reason to know that the person making it does not intend it as an expression of his fixed purpose until he has given a future expression of assent, he has not made an offer."

Also, an acceptance to be legally effective must be for the identical terms and conditions of the offer. In 17 *CJS,* 674, Contracts, Sec. 42, it is stated:

> "The rule, as stated in Corpus Juris, which has been quoted and cited with approval, is that the offeror has a right to prescribe in his offer any conditions as to time, place, quantity, mode of acceptance or other matters which it may please him to insert in and make a part thereof, and the acceptance, to conclude the agreement, must in every respect meet and correspond with the offer, neither falling short or, nor going beyond the terms proposed but exactly meeting them at all points and closing with them just as they stand and, in the absence of such an acceptance, subse-

quent words or acts of the parties cannot create a contract."

In *R. J. Daum Const. Co. v. Child,* 122 Utah 194, 747 P2 817, Sec. 73 of *Williston on Contracts, Revised Edition,* was quoted in part as follows:

> ". . . and if any provision is added to which the offeror did not assent, the consequence is not merely that this provision is not binding and that no contract is formed, but the offer is rejected."

That case held that no contract was entered into when the acceptance did not include an extra price contained in the subcontractor's offer even though the extra price provision later became moot due to the terms of the principal contract. In this case, however, Mr. Taylor specified shipment on April 1, 1957, whereas the quotation of January 25, 1957, was for shipment approximately on April 15, 1957. (The reference to two weeks after April 1, 1957, refers not to the order in question but as to the buyer's transaction with his purchaser.) Thus no contract was entered into until seller's conditional acceptance of buyer's order on February 6, 1957, which expressly provided that the shipment time would be specified by the foundry filling the order (EXHIBIT 7) and the latter specified one-half in April, 1957, and one-half in May, 1957 (EXHIBIT 8). Buyer's letter of March 2, 1957, EXHIBIT 5) recognized the terms of acceptance by seller but requested an advance of its schedule to satisfy buyer's customer. Legally, therefore, the contract terms

were for delivery one-half in April, 1957, and one-half in May, 1957, or there was no contract. Thus no breach of contract could have occurred by April 10, 1957, when buyer cancelled his order (R. 58). Without a breach of contract, any offset to plaintiff's claim would be erroneous and should be reversed. The question as to whether seller's quotation of January 25, 1957, (EXHIBIT 2) was an offer or an invitation to make an offer, an issue raised by plaintiff in the pre-trial order (R. 6, paragraph No. 4) would be a question of law for the trial court and not a question of fact for the jury. The court treated it as an offer and plaintiff submits this was erroneous.

POINT III

THE PARTIES TO THE 1957 CONTRACT OF SALE CANCELLED IT BY MUTUAL CONSENT AFTER ANY CLAIM BY BUYER FOR DAMAGES AROSE SO AS A MATTER OF LAW THE DEFENDANT HAD NO VALID OFFSET ARISING FROM ANY BREACH THEREOF BY THE SELLER, AND IT WAS THEREFORE ERROR FOR THE COURT TO DENY PLAINTIFF'S MOTION FOR A DIRECTED VERDICT ON THIS GROUND.

Here it is undisputed that Mr. Taylor asked the American Brake Shoe Company to cancel the order on which respondent's offset was based and that the American Brake Shoe Company did so and never billed him for the 100 track shoes it made at his request. It is also undisputed that neither Mr. Taylor nor the respondent ever took any action to assert the claim upon which this offset was based until it was raised as defense to this

suit despite monthly contact with seller's representative for over 22 months (R. 64, 67). In fact, neither the respondent nor Mr. Taylor even had the original quotation from the seller when this case was tried. (Appellant produced a copy of it for trial pursuant to respondent's request, R. 43, 44). It stretches one's credulity beyond the breaking point to imagine that even Mr. Taylor could believe he had a justifiable claim against American Brake Shoe Company in view of his own actions in 1957 and complete silence concerning it for over six years. There was no evidence from which the jury could find that the contract of sale existed after May 4, 1957, so there was no question of fact concerning that point and the jury should have been directed accordingly. Even if there was no mutual rescission as a matter of law, it would be most unfair to allow a buyer to induce a seller to believe that a contract was rescinded and so allow the statute of limitations to bar any claim it had under a contract and then to permit the buyer, as here, to assert rights under it in defense to a bill he incurred thereafter and failed to pay. All the elements of, and reasons for the policy which give rise to, the doctrine of estoppel are here present and should be invoked to prevent respondent from denying a mutual rescission of the 1957 contract even if no mutual rescission in fact occurred.

The statement in *Hartwell v. Minneapolis-Moline Power Implement Company,* 117 Colorado 291, 186 P. 2d 228, that

> "A party to a contract can not treat it as binding and rescind it at the same time."

should apply equally under the facts of this case.

POINT IV

THE BUYER WAS UNDER A DUTY TO MITIGATE DAMAGES RESULTING FROM ANY BREACH OF CONTRACT BY SELLER, AND THERE WAS NO EVIDENCE THAT THE BUYER ATTEMPTED TO OBTAIN FOR HIS PURCHASER THE TRACK SHOES IN QUESTION BY APRIL 15, 1957, WHEN IT BECAME EVIDENT ON FEBRUARY 22, 1957, THAT DELIVERY OF PART OF THE ORDER WOULD NOT BE MADE UNTIL MAY, 1957, OR THAT IT WOULD BE IMPOSSIBLE TO ACQUIRE THEM FROM ANY OTHER SOURCE BY THE REQUIRED DATE TO EFFECT THE RESALE.

An injured party to a contract should minimize or even eliminate the damages he suffers as a result of a breach of contract and no recovery is allowed for special damages if the buyer fails to obtain substitute goods in time to consummate a resale of them. *Restatement of Contracts,* Sec. 336. *State of Delaware v. Massachusetts Bonding & Insurance Company* (Delaware) 49 F. Supp. 467. The rule is stated in 46 *Am. Juris.* 812, Sales Sec. 683 as follows:

> "The fact that a reasonable substitute may be obtained in the market materially affects the question of damages and may even limit the recovery to the difference between the agreed price

and what the article or commodity reasonably answering the purpose would have cost."

In this case the evidence is entirely devoid of any proof that Mr. Taylor took any efforts to meet this duty or ever made any inquiries to ascertain whether it was impossible to obtain a substitute product when he became aware on February 22, 1957, that the American Brake Shoe Company was not scheduling delivery in time to meet his customer's delivery date. The fact that the cancellation was made as late as April 10, 1957, for an imperative need to be filled April 15, 1957, demonstrates that the ultimate customer was able to meet his needs in a very short time from a competing product hence it was possible to mitigate any damages in this case. At least a court can not properly assume that this manufacturer was the only one who could make this product or make it within the required time or that Mr. Taylor had exercised reasonable diligence in ascertaining this but inadvertently failed to present proof of it. To allow special damages to stand under such circumstances is to eliminate the wise requirement and policy of the law to require damages to be lessened as much as is reasonably possible.

POINT V

TIME WAS NOT OF THE ESSENCE OF THIS CONTRACT AND THERE WAS NO EVIDENCE THAT THE SELLER WAS AWARE ON JANUARY 31, 1957, THAT SPECIAL DAMAGES IN THE AMOUNT OF THE OFFSET AL-

LOWED BY THE COURT WOULD OCCUR IF THE ORDER WAS NOT DELIVERED BY APRIL 15, 1957, AND IT WAS ERROR THEREFORE TO ALLOW SUCH SPECIAL DAM-

The contract in question did not expressly state that time was of the essence and the seller had no reason to believe that without strict performance with respect to time that the contract of sale would not accomplish its purpose.

In such circumstances the modern rule is that time is not of the essence. 17A *C.J.S.* 789, Contracts Sec. 504 (1). In the case of *I-XL Eastern Furniture Company v. Holly Hill Lumber Co.* (D.S.C., 1955), 134 F. Supp. 343, the court declared:

> "Courts are reluctant to hold that time is of the essence in contracts for manufacture and sale of non-existent goods, particularly when the goods are made to special order and are of a kind not readily saleable in the general market."

The Court properly instructed the jury that special damages could be alllowed only to the extent that the jury found from the evidence such damages was in the contemplation of the parties at the time of the contract by reason of a knowledge of the special facts and circumstances from which such special damages would arise (R. 70, 71, Instruction No. 4).

In this case the evidence showed only that the seller knew that the track shoes in question were being purchased to fulfill an order the buyer had from his customer who had specified a delivery by April 15, 1957. There is no evidence in the record that the seller knew the terms of the buyer's resale. It may be presumed they contemplated a 20% profit since their quotation was based on a discount of that amount "for resale." That amount would be $1,164.00 according to the price of $34.65 per hundred weight according to the price on which the jury assessed the offset (20% of $34.65 x .70 x 240) or $1,558 if the price of $44.00 per hundred weight which appellant contends would be applicable is used. Likewise, there is no intimation at all in the evidence that the seller knew or had any reason to know that the buyer's customer would cancel the order if delivery was not to be made exactly as specified. There was no evidence from which it could be inferred that delay to the delivery date intended by the American Brake Shoe Company would be so critical as to amount to a failure of consideration on the buyer's contract with that customer and it is inconsistent for the buyer in such situation to insist on holding his seller and releasing his buyer after both purchasers cancelled their orders. The actual loss to the American Brake Shoe Company of manufacturing a custom product for which it then had no sale no doubt exceeded by a considerable amount the actual loss sustained by Mr. Taylor. At least the loss to that company ought not to be increased at the price of Mr. Taylor's generosity in not holding his customer to his contract. The lesser

amount Mr. Taylor would realize on that sale after deducting the losses that Palisade Contractors would have sustained in getting half of subject product up to 15 days later than specified and the other half between 15 and 45 days beyond that time would normally be considerable less than the profit American Brake Shoe had in this production and the latter would undoubtedly have preferred to adjust its price to that extent so as to lose much less than as occurred here.

POINT VI

THERE WAS NO EVIDENCE THAT WOULD JUSTIFY THE JURY IN ALLOWING AN OFFSET IN EXCESS OF $1,694.40, AND IT WAS THEREFORE ERROR FOR THE COURT TO ALLOW A VERDICT OF $2,590.00 TO STAND IN SPITE OF PLAINTIFF'S MOTION FOR REDUCTION TO THE LESSER AMOUNT NOTWITHSTANDING THE VERDICT.

As will be seen from the price quotation of American Brake Shoe Company (EXHIBIT 2), the price of the *non-skid* type shoe, the type applicable in this case (EXHIBITS 3 and 1), would be $44.00 per hundred weight rather than $34.65 per hundred weight for the other two types of different size and weights as set forth in that quotation. There is no evidence whatsoever that the price for the non-skid type was to be less than $44.00 per hundred weight no matter what width or weight was

ordered. Hence the jury's verdict in accepting the computations of respondent's counsel ($31.70 x 240 less $34.65 x .70 x 240 less 20% = $2,799.84) with some unexplained compensating adjustment finds no support in the evidence and must be adjusted in accordance with the proof. If any offset is allowed at all, it must be computed as follows: $31.70 x 240 less $44.00 x .70 x 240 less 20% of the last figure, which would amount to $1,694.50, the same figure except for 10c given in respondent's motion to correct the judgment (R 77).

CONCLUSION

The trial court erred in denying plaintiff's motion for a directed verdict at the conclusion of the case and in not entering a judgment for plaintiff as prayed notwithstanding the verdict in accordance with plaintiff's motion after the verdict was returned because any contract entered into by the parties which involved the disputed offset was not breached by plaintiff's assignor with respect to the delivery date (Point II above), because the contract between them expressly excluded any liability for such special damages as involved here (Point I), because the contract of sale was rescinded by mutual consent after any liability under it arose (Point III), because no special damages were in the contemplation of the parties to the contract at that time (Point V), because the buyer here made no attempt to mitigate or eliminate any special damages (Point IV) or for any of said reasons.

Even if an offset is allowed because none of the above points have merit, the maximum offset allowable under the evidence would be $1,694.40 (Point VI), and in that event the judgment should be for the sum of $1,790.62 plus interest on that sum since December 11, 1961.

Respectfully submitted,
HANSEN & SUMSION
65 East 4th South
Salt Lake City, Utah